IN THE
COURT OF JUSTICE
OF THE
EUROPEAN COMMUNITIES

CASE C – 01/01.

MILOS,
APPLICANT

V

STATE OF MADRETSMA,
HIGH COURT OF MADRETSMA,
RESPONDENTS

(On Request for a Preliminary Ruling from the Supreme Court of Madretsma)

WRITTEN OBSERVATIONS FOR RESPONDENT

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SUMMARY OF ARGUMENT

Milos, a citizen of Ecin, a member state of the EU, applied for a place on an educational exchange scheme to the University of Slessburg in Madretsma, also a member state of the EU. In May 2000 the University of Slessburg notified Milos that he had been allocated a provisional place which was subject to confirmation in July 2000.

On 30th July 2000 Milos, was informed that his provisional place at the University of Slessurb would not be confirmed. This was due to the fact that the foreign student body of the university exceeded the limit prescribed by the Ministry of Education of Madretsma, namely 10%.

Milos therefore commenced proceedings against the University of Slessburg relying upon EC Directive 186/98 which, nevertheless, could not be invoked before national courts in Madretsma since it was not capable of producing direct effect especially against educational institutions such as the University of Slessburg. Moreover, the Directive lacked a proper legal basis and the State of Madretsma contends that it should not have been adopted by the EU in the first place.

Consequently, Milos initiated proceedings against the High Court of Madretsma for a failure to refer which were also incorrectly founded since the High Court was under no obligation whatsoever to refer the question of direct effect of Directive 186/98 to the European Court of Justice.

Furthermore, Milos started proceedings against the State of Madretsma as well as the High Court of Madretsma. As the case included a claim against the High Court as a body, the High Court transferred the case to the Supreme Court of Madretsma for a trial, in accordance with national procedural rules. The Supreme Court of Madretsma accordingly adjourned the case and referred it for a preliminary ruling to the ECJ under Article 234 EC.

Milos's claim that the non-referral by the High Court of Madretsma moreover gave rise to state liability is similarly unfounded since the conditions for determining state liability are in the present case not fulfilled. Likewise fallacious is the applicant's claim that he was the subject of discrimination under Article 12 EC Treaty although he falls within the category of persons receiving a service pursuant to Article 49 EC Treaty.

Question 1: Are the provisions of Directive 186/98 capable of direct effects?

We hold that the provisions of Directive 186/98 are too imprecise, unclear and conditional to be capable of direct effect.

1.1. Article 249 of the EC treaty holds that Directives are generally not designed to be capable of direct effect and in the case of the Minister of Interior v. Cohn – Bendit ((1980) 1 CMLR 543) it is stated that Directives only have effect internally through national implementing measures. However in a number of cases that followed this latter view was slightly amended. The Yvonne van Duyn v. Home Office (Case 41/74) case states, "It is necessary to examine, in every case, whether the nature, general scheme and wording of the provisions in question are capable of having direct effects on the relations between Member States and individuals". The criteria the provisions of a Directive have to comply with are first mentioned in the N.V Algemene Transport en Expeditie Onderneming Van Gend en Loos v. Nederlandse administratie der belastingen (Case 26/62) case. The ruling states that the prohibition, either negative or positive, should be a "a clear and unconditional prohibition". In following cases these criteria's are extended to three for a Directive to be capable of direct effect. The Pubblico Ministero v. Tullio Ratti (Case 148/78) and Becker v. Finanzamt Munster-Innenstadt (Case 8/81) cases state that the provisions of a Directive should also be sufficiently precise, and thus leave Member States "no discretionary power" in the manner of its implementation (Van Duyn) to be capable of direct effect. If all these criteria's are met "those provisions may be relied upon by an individual against the State where that State has failed to implement the directive in national law by the end of the period prescribed or where it has failed to implement the directive correctly" (Fratelli Costanzo (Case 103/88)). We state that the provisions of Directive 186/98 are not clear and sufficiently precise and are conditional to be capable of direct effect.

1.2. Article 6 of Directive 186/98 states "Member States should require national educational establishments […] and implement the necessary national measures". In this article and in the rest of the Directive it is not stated what the necessary measures are that the national educational establishments have to take in order to increase the percentage of non-nationals in the student body. The provisions of this article are not sufficiently precise and leave room for different means of implementation by the Member States and therefore are not capable of direct effect.

1.3. Article 3 of Directive 186/98 states “Pre-existing differences […] giving rise to barriers”. The article does not explain what the pre-existing differences are and what kind of barriers they give rise to. These two statements also remain unclear in the other parts of the Directive. The last sentence of the article is “These barriers […] education services approximated.”. Again it is not explained what these barriers are and the last word of the sentence *approximated* shows a very unclear statement. It is not clear to which standard the rules relating to education services should be approximated and thus leaves a great deal in the open. The unclarity of the Directive makes it not capable of direct effect.

1.4. The Directive 186/98 which the State of Madretsma is accused of not implementing was adopted on the basis of framework Directive 93/96/EEC. The latter Directive covers the right of residence for students. This Directive was adopted by the State of Madretsma as well as by the State of Ecin, the state of which the applicant is a citizen. Paragraph 6 of Directive 93/96/EEC states “Whereas beneficiaries of the right of residence must not become an unreasonable burden on the public finances of the host Member State”. Whether something becomes an unreasonable burden on the public finance is to decide for each Member State itself. The decision that paragraph 6 of Directive 93/96/EEC implies makes the Directive conditional. The States of Ecin and Madretsma adopted directive 186/98 on the basis of Directive 93/96/EEC and the condition it implies. The conditional basis makes Directive 186/98 not capable of direct effect.

1.5. The Comitato di Coordinato per la Difesa della Cava v. Regione Lombardia (Case C - 236/92) case states that the Directive in that case was not unconditional or sufficiently precise to be relied upon by individuals before national courts since the Directive “merely indicated a program to be followed and provided framework for action” by the Member States. Directive 186/98 introduces the program to “encourage, support and enable co-operation between Member States in the area of education” in the first article and in the following articles a framework for action is presented. The final aim of the Directive, a student body of up to 20% of non-nationals, is given and the relevant framework of action is introduced, for instance facilitating the increase in student mobility. Directive 186/98 does not give precise measures that have to be taken, it just gives a framework of action. The judges in the Comitato di Coordinamento per la Difesa della Cava v. Regione Lombardia ruled that in order for a Directive to be capable of direct effect it must be “set out in unequivocal terms”. Directive 186/98 is not set out on unequivocal and leaves great discretionary power to the Member States for its implementation as is stated in article 6 that the Member States should “implement the necessary national measures” and does not clearly specify what these

measures are. Considering all the facts mentioned above Directive 186/98 can not be capable of direct effect.

1.6. The Faccini Dori v. Recreb SLR (Case C - 91/92) case states that in the absence of measures transposing the Directive within the prescribed time limit, individuals cannot derive rights from the directive enforceable in national court. Considering that Directive 186/98 was not implemented within the prescribed time limit, the State of Madretsma lacked measures transposing the latter Directive. Directive 186/98 can therefore not be capable of direct effect.

1.7. To sum up, the provisions of Directive 186/98 are often not clear and leave too much discretionary power in the manner of its implementation to the Member States. Directive 186/98 only contains a certain program and a framework of action. This is not a sufficient basis for the Directive to be capable of direct effect. The framework Directive 93/96/EEC on which Directive 186/98 is adopted contains a condition. This conditional basis causes Directive 186/98 to be not capable of direct effect and cannot be relied upon by the applicant against the State of Madretsma.

Question 2: Can a higher educational establishment that requires a government license to provide educational services and receives a proportion of its annual budget from the State can be included in those bodies against which provisions of a Directive capable of having direct effect may be implemented upon?

We submit that higher education establishment that requires a government license to provide educational services and receives a proportion of its annual budget from the State cannot be included in those bodies against which provision of a directive capable of having direct effect may be implemented upon. Our position is based on the following arguments:

2.1. First of all the University of Slessurb cannot be directly affected by the provision of a directive, because is not among the public bodies that the Court has ruled to be directly affected by the provisions of a directive. The court has held in several cases (Fratelli Constanzo v Commune di Milano (Case 103/88), Johnson v Chief Constable of the Royal Ulster Constabulary (Case 222/84), Becker (Case 8/81) and others) that provisions of a directive could be relied against the State bodies and organizations. We must see carefully note however the accent on “State bodies and similar organizations”. This Court has never

stated in any of the relevant cases that a University would constitute a public body that would fall under the eventual direct effect of a directive. The applicant might wrongly believe that this case looks similar to cases such as Van Duyn, and Ratti, where the claimant sought to invoke a Directive against a public body, an arm of the State. These cases involved vertical direct effect, which reflected the relationship between the individual and the State. Or, as stated before, we are confident that the University of Slessurb does not fall under the definition of public bodies. We were convinced of this statement due to two reasons. First the court has never given in its rulings the precise and exact definition of a "public body". Second, while acknowledging the Court's opinion about Directives we encountered the court raising a rhetorical question whether "universities were 'public' bodies? Court rulings did not produce effective evidence to prove whether universities are actually public bodies. The respondent is convinced that this above mention question is completely losing its rhetorical trend in this case. Namely, the University of Slessurb could by no means be considered a public body. This argumentation combined with previous facts yield the result that shows that higher education establishment can not be directly effected by the directive.

2.2 Secondly, the directive cannot directly affect the University of Slessurb because they are not under the direct control of the State. We are aware of the fact that in Foster v British Gas Plc (Case C-188/89) court has ruled that a directive might be invoked against 'a body, whatever its legal form, which has been made responsible, pursuant to a measure adopted by the State, for providing a public service under the control of the State. However, in our particular case, Slessurb University is by no means under the control of the State. It is confirmed practice that universities have different degrees of freedom and independence in different countries. Our University of Slessurb obviously has a license from the Ministry of Education of Madretsma and traditionally receives part of their income from public funds. However, the receival of a state license does not subject the University of Slessurb to the direct authority or control by the State. The subjection to a State license simply means that a particular organization is allowed to provide a kind of public service in accordance with the national law of a Member State, at a required minimal level. At the moment the University was granted the license, State has lost all authority over the University. Giving away the license the State has experienced only initial and symbolic authority over the educational facility. In addition, in this particular case we do not have any tangible evidence of State interfering into management decisions of this particular university. We only have facts of solely university making decisions (for example accepting or rejecting the student). These arguments clearly show that administration wise Slessurb University is completely independent from the control of the State. Therefore we arrive again at the conclusion that

Slessurb University is not among bodies that can be directly affected by the directives. Hence a high education establishment requiring a license from the government cannot fall among those bodies against which a direct effect of a Directive can be applied.

2.3 Finally, in addition to the second argument, University of Slessurb is the body that cannot be subjected to the direct control or authority by the State because of its financial independence. The University on average receives only about 20% of its required annual budget in the form of subsidy from the State for the last ten years. However the remaining 80% do came from student fees and private sponsorship. Evidently this proves that the state is incapable of representing the dominant authority in the management affairs of the Slessurb University. The mere 20% of funds of the university provided by the State are simply intentional and voluntary contribution to the public education of a nation. As well non-intervention of governments into academic and administrative life of universities is considered to be a sign of strong democracy, which European Union highly promotes and defends. So, the fact that the university has received a grant from the state does not make it a subordinate organization that would be subjected to the direct effect of state control. This leads to a logical conclusion that a Slessurb University is a completely independent body from the State authority. This allows us to conclude that university can not be a public body against which the Directive could be enforced.

2.4 Summarizing our arguments, we submit that it is logical that Slessurb University can not be among those bodies that can be affected by the direct effect of the directive. We have proved that Slessurb University is not a public body and that our particular university is completely administration and financially wise independent body. The court has not provided evidence in its rulings whether universities can be bodies against which the Directive could be enforced. For the reasons mentioned above, the court is asked to rule in favor of the state of Madredsma and consequently answer question 2 in the negative.

Question 3: Is it within the competence of the Community to enact European Parliament and Council Directive 186/98 of 31 March 1998 on the legal basis stated therein?

It is hereinafter submitted that it cannot be within the competence of the Community to enact European Parliament and Council Directive 186/98 of 31 March 1998 on the legal basis stated therein. The respondent supports this submission with the following arguments:

3.1. **In the first place Directive 186/98 claims as its legal basis a few Treaty articles unconnected among each other in such a way that a choice of this multiple legal basis would be justified.** Even without considering the apparent scope of the Directive, it can be concluded that such a many-sided legal ground would eventually create confusion as regards the one Treaty article that is to be considered objective and therefore the most appropriate one in this case. Implicitly a mixture of different decision making procedures arises from the use of this legal basis, further causing unnecessary difficulties with interpreting the reasons for the enactment of the Directive. Furthermore the State of Madretsma can see no justification in the Community choosing such a complex legal basis having that the scope of the Directive falls in areas that were previously addressed by the Community and they do not constitute absolutely crucial issues in this respect. The objective of Directive 186/98 stated in its first Article, namely "to encourage, support and enable co-operation between Member States in the area of education […]" can hardly be sought to require a legal basis of no less than four Treaty articles in principle not purposely linked among them. On the same line, this objective was already partly addressed in several other regulations or directives, such as the Council Directive of 29 October 1993 on the right of residence for students. It is simply logical that choosing a confusing multiple legal basis for a Directive addressing habitual issues previously dealt with would unavoidably lead to questions concerning its validity from a very first reading.

3.2. It is acknowledged that the principal procedural requirement for legality of Community legislation is that the Community institutions decide legislative measures on the basis of the appropriate Treaty provision. Special attention and responsibility concerning the choice of the Treaty articles chosen as legal basis are therefore crystal-clear duties of the Community legislator. This Court held in Federal Republic of Germany v European Parliament and Council of the European Union (Case C-376/98) and restated in several other cases (Commission v Council (Case C-269/97), Tobacco case (Case C-376/98) that "the choice of the legal basis for a measure must be guided by objective factors which are amenable to judicial review, in particular the aim and content of the measure". Therefore, in order to investigate whether the adequate legal basis was indeed chosen it has to be examined whether the competence to achieve the Directive's objectives is conferred upon the Community by the respective legal basis. **The respondent maintains that Directive 186/98 falls far from these headline requirements as far as its legal basis is concerned and further requires the Court to invalidate this act on grounds that Articles 149 (1) and (2) and 151 (1) and (2) EC Treaty were inadequate as legal basis, that Article 49 was an incorrect legal basis and that Article 308 was not the appropriate legal basis in this situation.**

3.3. **It is herein contended that there is a clear contradiction between the scope of Articles 149 and 151 EC Treaty on the one hand and Directive 186/98, on the other hand.** Interpreting its scope, Directive 186/98 obviously aims at harmonization of the laws and regulations of the Member States in the areas of educational services and related matters; in this sense the legislator demanded in Article 2 of the Directive that " …rules relating to access to access to education services [should be] approximated " and required in Article 10 of the same Directive that "Member States shall bring the laws, regulations and administrative provisions necessary to comply with the Directive into force". On the other hand both Articles 149 and 151 provide *expressly* in their 4th, respectively 5th paragraphs, that incentive measures adopted on this articles are to be "excluding any harmonisation of the laws and regulations of the Member States". Hence it is plain as day that no attempt is to be performed aiming at harmonization of laws in the Member States in any measures using as legal basis these Articles. It follows that Directive 186/98 directly and purposely disobeys this prohibition on the part of EC legislators when legally based on Articles 149 and 151 EC Treaty. Hence we require that the Court invalidates the use of Articles 149 (1) and(2) and 151 (1) and (2) as inadequate legal basis in this situation.

3.4. **It is further submitted that Articles 149 and 151 EC treaty not only did not confer powers to the Community to impose harmonization, but actually precluded the legislator from freely acting, in conformity with Article 5 EC Treaty (subsidiarity and proportionality)**. By virtue of our previous contention, it is by now clear that none of the Treaty articles (149 and 151) discussed here allowed to harmonization, approximation or any other modification of internal legislation. This follows from the fact that the Community was precluded from acting in those areas, the Member States definitely enjoying general competence therein. Article 5 EC Treaty ideally underlines the above statement by way of its subsidiarity principle, rigorously upheld by the Court in its case law: "In areas which do not fall within its exclusive competence, the Community shall take action, in accordance with the principle of subsidiarity only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale or effects of the proposed action, be better achieved by the Community". It is more than intriguing to find the EC legislator so openly breaching this Treaty article by allowing Community interference on basis of Articles categorically precluding it. Even if the case were to be exceptional in nature and subsidiarity would allow for minimal Community intervention, the measures asserted in the Directive would not be at all proportional to the objectives claimed therein. Madretsma would in this case be required to adapt its entire national law to a measure that the Community legislator ought to label exceptional. Hence the

actions of the Community as such would go beyond what the initial objective was and would openly violate the principle of proportionality mentioned in the same Article 5 EC Treaty. In the light of the foregoing, the Court should declare that it was not within the competence of the Community legislator to enact Directive 186/98 on the basis of the inadequate legal basis cited herein in this paragraph.

3.5. **In addition to the previous arguments and in line with our first argument we find at least intriguing and perplexing that the association between Articles 149 and 151 EC Treaty is used as legal basis for Directive 186/98 when their decision making process differs and their scopes complement each other.** The State of Madretsma found impossible to deduce an objective reason in the association of Articles 149 (1) and (2) and Article 151 (1) and (2) as legal basis for the stated Directive. While Article 149 requires a qualified majority in accordance with Article 251 EC Treaty and it is directly dealing with education in terms of vocational training, Article 151 requires unanimous voting and deals with the culture and history of the European peoples and their cultural exchanges. It is clear for the respondent that the obvious choice would have been Article 149 alone unless it could not by itself and independently sustain the Directive as legal basis. Further, the declarative scope of both first indents in these 2 articles is concisely included in Article 3(q) EC Treaty and requires in our opinion no specific inclusion as legal basis in both articles 149 (1) and 151(1) EC Treaty. Furthermore, taken in addition to Article 149(2) and in the limited context of Directive 186/98, Article 151(2) does not bring anything new, except an additional hustle of obtaining unanimity. Therefore we question the objectivity of this association and its entire meaning as a legal basis for the Directive in question and ask once more the Court in the light of all these reasons, to invalidate Articles 149 (1) and (2) and Article 151 (1) and (2) as completely inadequate legal basis.

3.6. **We sustain in what follows that Article 49 EC Treaty is an incorrect legal basis for Directive 186/98 as the objective of the Directive does not fall within the freedom to provide services.** The exact wording of the first indent of Article 49 EC Treaty provides : "[…] restrictions to provide services within the Community law shall be prohibited in respect of nationals of Member States who are established in a State of the Community other than that of the person for whom the services are intended". The objectives of Directive 186/98 in no way attain the issue of service providing, as the legislator claims. Quoting exactly from Article 1 of the Directive, "The objective of this Directive is to encourage, support and enable co-operation between Member States in the area of education and in particular student access to education, student mobility, promotion of linguistic skills and the development of a European dimension to education". We submit that the wording itself leads to *a quod erat*

demonstrandum. No direct link can be established between the Treaty article and the objective of the Directive. While the applicant might fall under Article 49 EC Treaty as such, the Directive is in no way valid by claiming this Article as legal basis. The legal basis is hence incorrect in the first instance.

3.7. **In a second instance Article 49 fails to account for a valid legal basis, as Directive 186/98 would consequently fall in disagreement with Article 46.** As this Court well knows, Article 46 EC Treaty limits the effect of all provisions in the whole Chapter concerning services in the EC Treaty provided that there are grounds of *public policy, public security or public health.* The decisions concerning the educational founding and related matters fall without question in the exclusive competence of the Member States, as above stated, and by extension within the public policy of that State. Madretsma requires the Court of Justice to take into account that Article 46 clearly provides that "The provisions of this Chapter [the services chapter] and measures taken in pursuance thereof shall not prejudice the applicability of provisions laid down by law, regulation or administrative action providing for special treatment for foreign nationals on grounds of *public policy, public security or public health*" (emphasis added). Should this Treaty article be cautiously observed Article 49 cannot be considered as legal basis for Directive that requires agreement of national policies with its measures, thereby ignoring an eventual asserted public policy ground. Hence any future law that required by a public policy would contradict the scope of the Directive in the sense provided by Article 49 would not be possible. Madretsma contends that by virtue of this combination between Article 49 and Directive 186/98 the national legislator is left without any power. Or this is against the fundamental principles that the European Community is based on. On the basis of what has been stated herein, we hereby ask this Court to annul Article 49 EC Treaty as an incorrect legal basis for Directive 186/98.

3.8. **The respondent further submits to this Court that Article 308 EC Treaty represents an inappropriate legal basis for Directive 186/98 as involving an objective that falls outside the realm of the common market.** The exact wording of Article 308 EC falls under the obvious interpretation that the power conferred therein is to be used only in the pursuance of a goal in the course of operation of the internal market and only when necessary specific powers were not already provided by the Treaty: "If action by the Community should prove necessary to attain, in the course of the operation of the common market, one of the objectives of the Community and this Treaty has not provided the necessary powers, the Council shall [..] take the appropriate measures". It is for the respondent clear that Article 308 EC Treaty cannot constitute a legal basis for Directive 186/98 as the objective of the above mentioned act clearly fails to fall within the realm of the internal EU market. Hereby the Treaty legislator

openly aims at increasing its powers by claiming this article as appropriate legal basis for enacting the Directive. As nowhere in the Treaty such an attempt is secured in any way, Article 308 amounts actually to an explicit amendment of the EC Treaty. And, as this Court is without any doubt aware of, in case of amendments of the EC Treaty Article 48 TEU (ex Article N) is the only appropriate legal basis. In the light of the foregoing, the Court should without hesitation rule that Article 308 is the inappropriate legal basis for Directive 186/98.

3.9. **The respondent suspects and consequently maintains that the use of Article 308 amounts to an attempt of evasion of the legislator from the checks and balances that are lawfully provided within the EU**. Madretsma hereinafter claims that Article 308 is the wrong legal basis for Directive 186/98 and the legislator enacting the Directive used this basis solely in order to evade the decision-making procedure of the more appropriate legal basis which in this case is Article 12 EC. Paraphrasing the wording of Article 12 EC, second indent, the Community is provided with the necessary powers to act within the scope of the EC treaty (according to the procedures provided for in Article 251 EC Treaty). The preference for Article 308 EC Treaty can only be justified by the different decision-making procedures. While Article 308 requires unanimous acting of the Council after consulting the Parliament, Article 12, by virtue of Article 251, requires the more burdensome co-decision procedure. Hence it would obviously be more difficult to pass the Directive under this article. This Court has rightly spotted in several cases by now the wrong use of Article 308 EC by the Council in its attempt to avoid using a legal basis with a different decision-making procedure. To give only a few examples, in Case C-295/90 Parliament v Council (Students' Rights) the Court has found that Article 308 was wrongly used as an attempt to avoid exactly Article 12 (2), the appropriate article in our case. Furthermore the Court held in Case 242/87 Commission v. Council (Erasmus) Article 308 was wrongly used as legal basis instead of Article 151 EC. Given the similarity and common elements of these cases, we find this evidence overwhelming for the Court to declare without any second thoughts that Article 308 is not appropriate as legal basis in this case. Madretsma suspects that the Community legislator is simply trying to reinvigorate and re-instantiate the general use of Article 308 given its constant decline after the Treaty of Maastricht partly due to the excellent supervisory role performed by this Court. We are confident that the Court will be consistent in its trend and further stop this attempted breach of Treaty law.

3.10. **In the light of all the arguments above, we ask the Court of Justice of the European Communities to annul Articles 149 (1) and (2), Article 151 (1) and (2), Article 49 and Article 308 EC Treaty and consequently to invalidate Directive 186/98**. The defendant clearly submits that it was not within the competence of the Community to enact European

Parliament and Council Directive 186/98 of 31 March 1998 on the legal basis stated therein and that in agreement with the powers conferred by the Treaty to this Court, the Court should answer the question in the negative and consequently rule that this Directive is not valid.

Question 4a: Was there an obligation on the High Court of Madretsma to refer the initial question of interpretation of the Directive to the ECJ under Article 234 EC?

For the following reasons we hold that there was no obligation on the part of the High Court of Madretsma to refer the initial question of interpretation of EC Directive 186/98 to the Court of Justice under Article 234 EC Treaty:

4a.1. The High Court of Madretsma is a court against whose decisions there is a judicial remedy under national law in the face of the Supreme Court of Madretsma. The existence of a national procedural rule according to which the applicant is refused leave to appeal to the Supreme Court of Madretsma confers upon the High Court of Madretsma the status of a last court of instance *in the case in question* but does not change its nature of a lower court established by law in general. The discretion whether to grant permission for appeal to the Supreme Court of Madretsma or not lies entirely with the High Court of Madretsma and a refusal of such a leave in the particular case constitutes an exercise of such discretionary powers which by no means is capable of changing the status conferred by law to the High Court of Madretsma – namely, a court whose decisions are subject to appeal. Thus the High Court of Madretsma squarely falls under Article 234(2) EC Treaty.

4a.2. The Court of Justice in its case law has contended that the discretion to refer given to lower national courts of the Member States is entirely unfettered and unconstrained with regard to the content and the framing of the questions referred, the timing of the referral made, the existence of previous similar rulings of the Court as well as of rulings of national courts of higher instance. Hoffman-La Roche AG v Centrafarm Vertriebsgesellschaft Pharmazeutischer Erzeugnisse mbH (Case 107/76), De Geus en Uitdenbogerd v Robert Bosch GmbH (Case 13/61), Da Costa en Schaake NV (Cases 28-30/62), Rheinmuhlen-Dusseldorf (Case 166/73).

4a.3. Article 234(2) explicitly states that a national court or tribunal may request the Court to give a preliminary ruling if it considers that “a decision on the question is necessary to enable

it to give a judgement" (*emphasis added*). Similarly, in Monin Automobiles – Maison du Deux-Roues (Case CA28/93) the Court clearly upholds the wording of Article 234(2) by suggesting that the question referred must be "objectively required" by the national court as "necessary to enable that court to give a judgement" in the proceeding before it as required under Article 234(2). In the present case though the High Court of Madretsma did not consider the matter at hand as necessary to be subject to interpretation since the issue was regarded to be reasonably clear. Thus in exercising its discretionary power to decide whether there was a need for interpretation, the High Court of Madretsma ruled on this question in the negative and consequently, was not under the obligation to refer to the European Court of Justice.

Even if the High Court of Madretsma were to be considered to fall within the scope of Article 234(3) rather than Article 234(2), for the following reasons it is submitted that *in the case in question*, there was no such obligation on part of the High Court of Madretsma to refer under Article 234(3) EC Treaty:

4a.4. The scope of Article 234(3) is not entirely clear. While it explicitly applies to courts and tribunals whose decisions are never subject to appeal, it is far from certain whether it also applies to courts whose decisions in the case in question are not subject to appeal. Until the Court has not given an authoritative ruling on the scope of Article 234(3), there could be no obligation on part of national courts in the circumstances of the High Court of Madretsma to refer but only a discretion to do so.

4a.5 Apart from the above-mentioned deliberations, it should be taken into consideration that in CILFIT Srl (Case 238/81) the Court suggested that the obligation to refer under Article 234(3) arises only when the national court "considers that a decision on the question is necessary to enable it to give a judgement". As it was already expounded upon aforehead, the High Court of Madretsma did not recognise such a necessity as it was convinced of the lack of a need for interpretation. Under such circumstances, the Court ruled in CILFIT Srl, national courts and tribunals including those referred to in the third paragraph of Article 234 remain entirely at liberty to decide whether to bring a matter before the European Court of Justice if they consider it necessary.

4a.6. Furthermore, in CILFIT Slr the Court formulated explicitly three conditions whose fulfillment is capable of releasing a court falling under the scope of Article 234(3) of its obligation to refer, namely if the national court has established that the question raised is irrelevant, the Community provision in question has already been interpreted by the Court or

the correct application of Community law is so obvious as to leave no scope for any reasonable doubt. In the present case it is the third condition which is of crucial significance and whose fulfillment in the particular case releases the High Court of Madretsma of its obligation to refer. As it is laid down in CILFIT Slr condition is a version of the doctrine of *acte clair* which the Court has continuously held in its case law to be capable of overriding the obligation to refer when a sufficiently clear legal provision does not require interpretation but only application (e.g., Da Costa en Schaake NV (Cases 28-30/62), Re Societe des Petroles Shell-Berre [1964] CMLR 462, Garland v British Rail Engineering Ltd [1983] 2 AC 751)

4a.7. The guidelines expounded in CILFIT Srl (Case 238/81) are furthermore comparable with Lord Denning's in H.P.Bulmer Ltd v Bolliger SA. He suggested that a decision would only be "necessary" if it was "conclusive to the judgement". Even then it would not be necessary if "the matter was reasonably clear and free from doubt". Although the criteria in both cases are similar, in CILFIT Srl they are clearly stricter. Nevertheless, in case the criteria are sufficiently met, they both explicitly strip the national judge of the obligation to refer, as in the present case.

4a.8. Moreover, the Court has continuously held that the question of referral is one for the national court to decide upon. In this respect, the applicant does not possess the legal capacity to challenge the decision of the High Court of Madretsma since the European Court of Justice has clearly stated that a party to the proceedings in the context of which the reference is made cannot challenge a decision to refer or not even if that party thinks that the national court's findings of fact are inaccurate (SAT Fluggesellsehaft mbH v. European Organisation for the Safety of Air Navigation (Case C-364/92).

4a.9. Furthermore, since Article 234 does not constitute a means of redress available to the parties to a case pending before a national court or tribunal, the mere fact that a party contends that the dispute gives rise to a question concerning the interpretation of Community law does not mean that the court or tribunal concerned is compelled to consider that a question has been raised within the meaning of Article 234. It is entirely within the discretionary powers of the national court or tribunal to decide on such a question (CILFIT Srl (Case 238/81). Nevertheless, as it has already been argued above, the High Court of Madretsma did not consider the question raised before it to be a question concerning the interpretation of Community law. Consequently, the doctrine of *acte clair* relieved it from its alleged obligation to refer.

In the light of the above mentioned arguments, it is obvious that there was no obligation on part of the High Court of Madretsma to refer the question of interpretation of Directive 186/98 to the European Court of Justice under Article 234 EC Treaty.

Question 4b: Can a claim for state liability against a Member State of the EU arise from a failure of a national court to refer a question for a preliminary ruling of the ECJ under the provisions of Article 234 EC when that question was required to resolve a dispute before that national court and that court was (by virtue of a national procedural rule) a court against there was no legal appeal in the national legal system?

We hold that a claim for state liability against a Member State of the EU can not arise from a failure of a national court to refer a question for a preliminary ruling of the ECJ under the provisions of Article 234 EC when that question was required to resolve a dispute before that national court and that court was (by virtue of a national procedural rule) a court against there was no legal appeal in the national legal system.

4b.1. The conditions under which a Member State may incur liability for damage caused to individuals by a breach of Community law (Brasserie du Pêcheur (51)), are not fulfilled in this case. These conditions are generally accepted and have been extensively applied in examining claims of State liability in case of a breach of Community law (British Telecommunications, Hedley Lomas, Denkavit International BV , Klaus Konle and Dillenkoffer). Furthermore, the Court stated in Norbrook Laboratories (107) that those conditions are to be applied according to each type of situation. For this reason, the respondent asks to Court to answer the question, whether a claim to State liability against a Member State can arise from a failure of a national court to refer, under the circumstances of this case, in the negative.

4b.2. The first condition for State liability mentioned in Brasserie du Pêcheur paragraph 51, that is not met in this case, is the condition that a breach of Community law has to be sufficiently serious. According to paragraph 55 of Brasserie du Pêcheur a breach of Community law is sufficiently serious 'whether the Member State concerned manifestly and gravely disregarded the limits of its discretion'. In order to test whether this is the case, while following the case law of the Court, (British Telecommunications, Denkavit International BV,

Brinkman, Rechberger, Klaus Konle and Haim), the criteria mentioned in Brasserie du Pêcheur paragraph 56 have to be applied by the national courts (Brasserie du Pêcheur and Factortame, (58), Haim (44)) .With respect to the breach referred to in this particular case the test fails since three criteria mentioned in paragraph 56 of Brasserie du Pêcheur are not met.

i. Firstly, the provision in article 234 EC (3) is not clear and precise, as it does not specify exactly to what category of courts the obligation to refer to the ECJ does apply. In the article the category of courts that is obliged to refer to the ECJ is described as: “a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law”. It is not clear whether this phrase should be interpreted in such a way that it only refers to the highest courts in the national judicial hierarchy, since those are the only courts against whose decisions in principle there does not exist any judicial remedy under national law or whether it should also refer to lower national courts to whose decisions there is in a particular situation no judicial remedy under national law because of a national procedural rule that applies in that particular situation. With respect to these interpretations, there does not exist general agreement on what interpretation has to be applied. In Costa v ENEL some support for the second interpretation is given as the Court said with reference to article 234 EC ‘By the terms of this Article . . . national courts against whose decisions, as in the present case, there is no judicial remedy, must refer the matter to the Court of Justice'. However, the interpretation of 234 EC given in Costa v ENEL is seen as specifically applicable in a situation of similar nature and is not extended by the Court as to be applicable in general. This position is supported by the acceptance of the case Lyckeshog by the Court in which the question was referred whether national courts are 'final' courts for the purposes of Article 234(3) if leave to appeal from their judgement is required. If there had already been a general agreement on the correct interpretation the Court would not have needed to accept the reference following the criteria for the need for referral under 234 (2) and (3) EC given by the Court in CILFIT.

ii. Secondly, even if the Court thinks that the provision of article 234 EC (3) is clear to the extent that lower courts can have the obligation to refer, there exists a widespread national practice in which the narrow interpretation of the category of courts, which is mentioned first above, has been applied resulting into a refusal of the lower courts to refer to the Court under 234 EC (H.P. Bulmer Ltd v J. Bollinger SA, Re a Holiday in Italy, and Magnavision (No.1)). This retention of national practice contrary to Community law would according to paragraph 56 of Brasserie du Pêcheur be ground for the fact that the Member State in this case did not ‘manifestly and gravely disregarded the limits on its discretion’.

iii. Thirdly, the breach of the obligation to refer was not of an intentional nature. The High Court of Madretsma has done its utmost in examing the request of the applicant to refer the case to the Court. Furthermore, it based its decision upon the rule of law of the State of Madretsma while experiencing a wide discretion which is common to a lower national ourt when it comes to the decision of referral under article 234 EC. Taking into account the unintentional character of the breach, while following article 56 of Brasserie du Pêcheur, it can be concluded that in this case the Member State concerned did not manifestly and gravely disregard the limits of its discretion.

The Court is requested to answer the question whether the breach is sufficiently serious in the negative, since the Member State did not manifestly and gravely disregarded the limits of its discretion because of three reasons. First, the provision under 234 EC is not clear and precise and if the Court thinks it is clearly the second interpretation mentioned above, there exists a widespread national practice against Community law. As final reason can be stated that the breach was not of an intentional nature.

4b.3. The second condition for State liability mentioned in Brasserie du Pêcheur paragraph 51 ,that is not met in this case, is the condition that the 'rule of law infringed must be intended to confer rights upon individuals'. Article 234 EC is not meant as providing 'a means of redress available to the parties to a case pending before a national court, therefore the mere fact that a party contends that a dispute gives rise to a question concerning the interpretation of Community law does not mean that the court or tribunal concerned is compelled to consider that a question has been raised within the meaning or that article'(CILFIT (2)). Further, as is stated in the deGeus en Uitdenbogerd (1): 'The treaty makes the jurisdiction of the Court of Justice solely dependent on the existence of a request under article 177 (now 234 EC)'. From this, it can be concluded that the decision to refer is left entirely to the discretion of the national court and consequently no rights are granted to an individual party with respect to the matter of referral. This view is generally held in the case law of the Court. (van Gend & Loos, Costa-ENEL, Francovich and other cases). Taking this into consideration, the Court is asked to answer the question, whether the second criterion for State liability is met, in the negative.

4b.4. The third condition for State liability mentioned in Brasserie du Pêcheur paragraph 51, that is not met in this case, is the condition that there exists a direct causal link between the breach of the obligation borne by the State and the damage sustained to the individual parties. In this case, there is not a direct causal connection between the damage experienced by the applicant and the refusal of the high court to refer the case to the ECJ, since it is not the refusal of the high court of Madretsma to refer under 234 that directly causes the damage.

Furthermore, according to Brasserie du Pêcheur article 65 the determination whether there exists a causal link between the breach and the damage it up to the national court. For this reason, it is a simply a matter of fact and not a matter of law and therefore the respondent contends that the third condition for State liability is not met.

4b.5. The case law of the Court in British Telecommunications (40), HNL (5 and 6), and Brasserie du Pêcheur (40)), shows that the Court took a restrictive approach to claims of State liability against a Member State 'when exercising legislative functions in areas covered by Community law where the State has a wide discretion'. (British Telecommunications (40)). The reason to justify this is 'the concern to ensure that the exercise of legislative functions is not hindered by the prospect of action for damages whenever the general interest requires the institutions or Member States to adopt measures which may adversely affect individual interests.' (British Telecommunications (40)). The national courts by means of interpretation of the law have a limited legislative function. Furthermore, the national courts in this case have a wide discretion in the question to refer under article 234 EC (de Geus en Uitdenbogerd (1)). Therefore, it can be said that a restrictive approach to State liability is in agreement with the common legal practice and consequently the responding party thinks that the Court should take a restrictive approach to State liability in this case.

4b.6. In conclusion, as is generally accepted in the Court's case law that in order to for a claim for state liability to be granted the three conditions mentioned in Brasserie du Pêcheur (51) have to be met. However, in the case of a breach of the obligation to refer under 234 EC this is not the case. Firstly, the breach is not sufficiently serious, because the provision under 234 (3) is not clear and precise and because even when the Court thinks it is clear there exists a widespread national practice contrary to Community on this point. Secondly, the rule of law infringed does not confer rights upon individuals, as the procedure under article 234 EC is not seen by the Court as providing a means of redress to individuals. The national courts are the sole authorities when to decide about matters of referral. Thirdly, there is no direct causal link between the breach and the damage caused to the individual, since the refusal to refer does not cause any direct damage to the applicant. As last point it is noted that a restrictive approach with respect to State liability has to be taken in this case as it is generally accepted in the case law of the Court with respect to cases in which the institution has legislative power and wide a discretion.

4b.7. As the breach of the obligation to refer under article 234 EC in this case does not meet the general accepted conditions for State liability, the respondent asks the Court to answer the question whether a claim for State liability in such as case can be made in the negative.

Question 5: Can a student who attends a higher educational establishment in another Member State be considered to fall within the category of persons receiving a service pursuant to Article 49 EC and therefore entitled to prohibition of discrimination laid down in Article 12 EC?

We hold that a student who attends a higher educational establishment in another Member State is considered to fall within the category of persons receiving a service pursuant to Article 49 EC, however, he is not automatically entitled to prohibition of discrimination laid down in Article 12 EC?

5.1. Article 49 EC directly refers to the right to supply services. However, although not obviously within the strict wording of Article 49, it has been held that the converse of Article 49 also applies, that is, that a person may go into another member state to receive a service. In fact, the Court has not limited the right to receive services to education, training and vocational programs, but has extended the scope of this doctrine to include the right to travel to other Member States for the purpose of obtaining any form of services, even the general services afforded to tourists.

5.2. Article 49 does not state what is considered to be a service. However, the first paragraph of Article 50 of the Treaty provides that only services normally provided for remuneration are to be considered to be services within the meaning of the treaty. Even though the concept of remuneration is not clearly defined in Article 49, its legal scope is apparent from the provisions of the second paragraph of Article 50 of the Treaty, in which the main categories of services to which Article 49 refers are further mentioned : "[…] Services shall in particular include: a) activities of an industrial character, b) activities of a commercial character, c) activities of craftsmen, d) activities of the professions". With respect to this, activities of the professions include educational services provided by universities; hence, educational training offered by the University of Slessurb constitutes a service.

5.3. In joined Cases 286/82 and 26/83 Luigi and Carbone v Ministero del Tesoro, the court held that the freedom to provide services includes the freedom for the recipients of services to go to another Member State in order to receive a service there, and without being obstructed by restrictions. Moreover, In case 293/83 Francoise Gravier v City of Liege, the Court ruled

that any form of education, which prepares for a qualification for a particular profession, trade or employment is vocational training, whatever the age and the level of training of the pupils or students, and even if the training program includes an element of general education Vocational training is therefore considered a service for the purposes of Article 49 EC.

5.4. In case 24/86, Blaizot & Ors. v University of Liege & Ors, the court held that university studies fulfilled the required criteria to amount to vocational training.

5.5. We hold that a student who attends a higher educational establishment in another Member State can be considered to fall within the category of persons receiving a service pursuant to Article 49 EC, however, he is not automatically entitled to prohibition of discrimination laid down in Article 12 EC. We believe that the question has not been well formulated, as we do not agree with the implied consequence. We are of the opinion that Milos has not been discriminated against by the University of Slessurb, and therefore, as a student from a Member State seeking educational training in the state of Madretsma, he is not entitled to rely on Article 12 EC.

5.6. By prohibiting ‘ any discrimination on grounds of nationality’ Article 12 of the Treaty requires that persons in a situation governed by Community Law be placed on a completely equal footing with nationals of the member state. Therefore, this article is relevant when the situations are equal. However, the situation of foreign students within the Community is different from the situation of national students and therefore the same rules do not apply. Consequently, we hold that this situation requires special treatment.

5.7. The issue at hand concerns an educational institution, whose system is particularly different than that of other establishments, moreover, educational organization and policy are not as such included in the spheres, which the Treaty has entrusted to the Community institutions, and therefore educational institutions are accompanied by different rules and regulations.

5.8. Different educational programs are structured in different ways, which means that there is no uniformity within the Community in this particular field, they operate with different schemes and offer different grants so that students from other Member States also have the opportunity to benefit from educational services offered in the different Member States.

5.9. In case 42/87, Commission of the European Communities v Kingdom of Belgium, it was demonstrated that the Belgian national legislation provided that only certain categories of

foreign students, exhaustively listed in the provisions, were to be taken into consideration as regular students with regard to state financing of higher education establishments, represented a breach of the prohibition on discrimination contained in Article 12. Moreover, in Case 24/86 Blaizot & Ors. v University of Liege & Ors, the Court established that the course in question fell within the meaning of vocational training and consequently a supplementary enrollment fee charged to students who were nationals of other Member States and wished to enroll for such studies constituted discrimination on grounds of nationality. However, the present case is of a completely different nature, Milos was not presented with a financial barrier such as the so-called "minerval fee". Milos was placed on equal footing with other foreign students. The government of Madretsma does not discriminate among different foreign students, the 10% law applies to all of them equally. The national law of Madretsma does not create any barrier to his freedom of movement or to his rights to receive services in Madretsma even though he is a national from another (Member) State, therefore, Madretsma and the University of Slessurb are in full compliance with the provisions of Article 12. Therefore, the state of Madretsma has not imposed any restrictions, which could constitute discrimination on the grounds of nationality prohibited under Article 7 of the Treaty.

5.10. Milos commenced proceedings against the University of Slessurb on the basis that the decision was contrary to the provisions of Directive 186/98. However, the directive is mainly concerned with the barriers to the movement of young people in the European Community and not with the issue of discrimination, therefore, the Directive does not form a direct link with the provisions of Article 12.

5.11. The legal basis of the Directive was stated as Articles 49, 149 (1) and (2), Article 151 (1) and (2) and Article 308. As previously mentioned, Madretsma has not upheld any barriers to the freedom of movement of Milos into Madretsma or to his right to receive services, therefore, we are of the opinion that the state of Madretsma has not committed any breach of EU law in what concerns Article 49.

5.12. Among the general principles of law that bind the EU, its institutions, the Member States and individuals, the right to equality is widely accepted. In the present case, with regard to Directive 186/98, if non-discrimination were the main goal, it would be rational for the Directive to be based on Article 12 EC, and it is not, as we have previously argued in the answer to question 3.

5.13. Moreover, the Directive itself is not consistent with the principle of equality. Article 6 of the Directive states that: “[…] Member States should require national educational

establishments to seek to achieve a student body of up to 20% non-nationals […]". We are of the opinion that if one is to refer to the issue of discrimination, then it seems that the directive itself is not more consistent with the issue of equality than the decision taken by the Ministry of Education in Madretsma. If equality were to be the main goal, the national and non-national student body should comprise a proportion of 50% each. The 20% mentioned in Directive 186/98 is not too different from the 10% suggested by the Ministry. In view of this, we are of the opinion that the directive could then constitute a breach of EC law itself (violation of Article 12). Should the court rule that the University of Slessurb has behaved in a discriminatory manner against Milos, then, Directive 186/98 is discriminatory as well.

5.14. In conclusion, we hold that Milos as a student from a Member State, who attends a higher educational establishment in another Member State is considered to fall within the category of persons who receive a service for the purposes of Article 49, however, because of the nature of his case, he is not entitled to prohibition of discrimination under Article 12 of the Treaty.

SUBMISSIONS

WHEREFORE, Respondents respectfully submit to this Honorable Court that it returns this case to the Supreme Court of Madretsma with a Preliminary Ruling:

1. **Answering in the negative question No. 1.**
2. **Answering in the negative question No. 2.**
3. **Answering in the negative question No. 3.**

4.a. Answering in the negative question No. 4.a.

4.b. Answering in the negative Question No. 4.b.

5. **Answering in the affirmative Question No. 5.**

Respectfully submitted,

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Desislava Stoitchkova
Sebastian Buhai
Roderick Reimers
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AND THE HIGH COURT OF MADRETSMA,
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Dated: 04 April 2001

APPENDIX

Contributions:

Bibiana Becerra-Suarez

Submission on question 5

Sebastian Buhai

Submission on question 3
Authorities, Table of Contents, Submissions
Final editing
Lay-out

Roderick Reimers

Submission on question 1

Maarten Stikkelman

Submission on question 4b

Desislava Stoitchkova

Submission on question 4a
Authorities, Summary of Argument, Appendix
Final Editing
Lay-out

Simonas Vileikis

Submission on question 2